85-566

Supreme Court, U.S.
FILED
SEP 30 1985
JOSEPH F. SPANIOL, JR.
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NO. 85-_____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

BRAXTON H. ANDERSEN, et al.

Petitioners

Versus

CIBA-GEIGY CORPORATION, et al.

Respondents

Petition For A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Melburne D. McLendon, P.C.,
Counsel of Record for Petitioners

H. Sanders Carter, Jr.
Anthony J. McGinley

CARTER, ANSLEY, SMITH & McLENDON
1810 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9220

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QUESTIONS PRESENTED

A. Are the lower courts limited to a deferential "arbitrary and capricious" standard in reviewing an employer's denial of ERISA benefits, when the employer completely disregards ERISA's administrative, procedural, and fiduciary requirements?

B. If so, is an employer's disavowal of its ERISA obligations and its resulting violation of ERISA's procedural requirements probative of whether a particular denial of benefits was arbitrary or capricious, as held by the Ninth Circuit Court of Appeals in Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984)?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are parties to this Petition. The full list of petitioners is as follows: Braxton H. Andersen, Frank Kenneth Basinger, Pamela E. Johnson, Patricia L. Murph, Richard B. Peterson, Shirley Sharp, Robert V. Tucker, Ronald D. Yost, Verline Bryant, Sharon Dover, Norma L. Fanning, Joy Harris, Josey Jarrett, Emma Johnston, Robert Lee Keaton, Kathy Nealey, Walter Nealey, Michael L. Nystrom, Elbert Payne, Ruby C. Payne, Louetta Davis Raymond, and Louie A. Herman.

The full list of respondents is as follows: Ciba-Geigy Corporation, Employee Benefit Plan of Ciba-Geigy Corporation, Corporate Employee Benefit Committee, Ciba-Geigy Corporation, Robert Hochhauser, Roy W. Lawrence, George H. Stewart, Dr.

PARTIES TO THE PROCEEDING (Continued)

Charles E. Ziegler, William H. Ebert, John Mincy, Michael Whelan, Stanley Kase, John Mullins, John O'Connor, and Stanley Sherman.

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BRAXTON H. ANDERSEN, FRANK KENNETH BASINGER, PAMELA E. JOHNSON, PATRICIA L. MURPH, RICHARD B. PETERSON, SHIRLEY SHARP, ROBERT V. TUCKER, RONALD D. YOST, VERLINE BRYANT, SHARON DOVER, NORMA L. FANNING, JOY HARRIS, JOSEY JARRETT, EMMA JOHNSTON, ROBERT LEE KEATON, KATHY NEALEY, WALTER NEALEY, MICHAEL L. NYSTROM, ELBERT PAYNE, RUBY C. PAYNE, LOUETTA DAVIS RAYMOND, and LOUIE A. HERMAN

Petitioners

Versus

CIBA-GEIGY CORPORATION, EMPLOYEE BENEFIT PLAN OF CIBA-GEIGY CORPORATION, CORPORATE EMPLOYEE BENEFIT COMMITTEE, CIBA-GEIGY CORPORATION, ROBERT HOCHHAUSER, ROY W. LAWRENCE, GEORGE H. STEWART, DR. CHARLES E. ZIEGLER, WILLIAM H. EBERT, JOHN MINCY, MICHAEL WHELAN, STANLEY KASE, JOHN MULLINS, JOHN O'CONNOR, and STANLEY SHERMAN

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Roney, Hill, and Tuttle (Senior Judge), J.J.) is officially reported at 759 F.2d 1518 (11th Cir. 1985) and is set forth in the Appendix beginning at page A-1. The opinion of the United States District Court for the Northern District of Georgia (Moye, C.J.), whose judgment was affirmed by the court of appeals, is officially reported at 608 F. Supp. 668 (N.D. Ga. 1984) and is set forth in the Appendix beginning at page B-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 8, 1985. (App. C-1.) Petitioners' timely petition for rehearing and suggestion for rehearing en banc were

denied on July 1, 1985. (App. D-1.) This petition is filed within 90 days of that denial. See 28 U.S.C. § 2101(c) (1982); Sup. Ct. R. 20.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS

The text of §§ 2(b), 101(a)(1), 102, 402(a), 404(a)(1)(A), and 502(a)(1),(3) of the Employee Retirement Income Security Act of 1974, 88 Stat. 832, 840, 841, 875, 877, and 891, 29 U.S.C. §§ 1001(b), 1021(a)(1), 1022, 1102(a), 1104(a)(1)(A), and 1132(a)(1),(3) (1982) is set forth in the Appendix beginning at page E-1. The text of 29 C.F.R. §§ 2520.102-2(b) and -3(1), 42 Fed. Reg. 37180 (July 19, 1977), is set forth in the Appendix beginning at page E-9.

STATEMENT OF THE CASE

On January 13, 1983, petitioners filed suit against respondents in the United States District Court for the Northern District of Georgia. Petitioners sought severance pay benefits under an employee welfare benefit plan and damages against certain individual employees of respondent, Ciba-Geigy Corporation. The jurisdiction of the district court, the court of first instance, was invoked pursuant to 28 U.S.C. § 1331 (1982), as provided by § 502(e)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(e)(1) (1982).

On February 15, 1984, respondents filed a motion for summary judgment as to all remaining claims asserted in petitioners'

complaint.[1/] On the same date, petitioners filed a motion for partial summary judgment, seeking a determination of respondents' liability and reserving for later determination the amount of damages. The district court granted respondents' motion for summary judgment and denied petitioners' motion for partial summary judgment on April 26, 1984, and judgment was entered against petitioners and in favor of respondents on the same date. (App. B-1.)

Upon consideration of the parties' cross motions for summary judgment, the district

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1/ In an unpublished order dated September 13, 1983, the district court dismissed counts III and IV of petitioners' complaint, which were based on state common law theories of breach of contract and tort, on the grounds that those claims were preempted by § 514 of ERISA, 29 U.S.C. § 1144 (1982).

court had before it the following evidence. Petitioners were former employees of Ciba-Geigy Corporation. Ciba-Geigy offered its employees various benefits, including severance pay, which were set out in Ciba-Geigy's corporate personnel policy no. 7.1 dated June 1, 1972, and amended on March 15, 1981. This policy provided that Ciba-Geigy employees who were terminated for reasons other than cause would receive severance pay based upon their length of employment.

The policy defined severance pay as "payments made to an employee when the Company terminates the employer-employee relationship unless the employee has been discharged or special contractual arrangements provide otherwise." As an exception to the general provisions regarding severance pay, the policy stated

that "[t]his policy shall not be applicable in any special situation (such as the relocation of a major operating unit) where the Corporate Management Committee deems it necessary to establish a separate policy applicable to that situation only."

On July 21, 1981, Ciba-Geigy sold the entire division under which petitioners worked to Communications Technology Corporation ("CTC"). CTC specifically disclaimed any liability for severance pay claims by former Ciba-Geigy employees, and CTC did not offer similar severance pay benefits to its employees.

As a result of the sale, petitioners' employment with Ciba-Geigy terminated, and they were hired by CTC, the acquiring company, at the same salaries and job positions but with less favorable employee benefits. Ciba-Geigy refused to pay

petitioners severance pay benefits on the alternative grounds that petitioners were not "terminated," or that their termination was a "special situation" within the meaning of personnel policy no. 7.1. Petitioners were not given an option to refuse employment with CTC and receive severance pay.

In the district court, respondents steadfastly denied that personnel policy no. 7.1 constituted an employee welfare benefit plan within the meaning of ERISA until well after the litigation had commenced. As a result, petitioners urged that they were denied severance pay without any consideration of the fiduciary duties imposed by § 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A) (1982). Further, petitioners urged that the severance pay policy and the denial of their claims violated various reporting, disclosure, and

procedural requirements of ERISA, particularly §§ 101(a)(1), 102, and 402(a), 29 U.S.C. §§ 1021(a)(1), 1022, and 1102(a).

Based upon respondents' complete disavowal of fiduciary obligations and on their administrative and procedural violations of ERISA, petitioners urged that the deferential arbitrary and capricious standard should not be applied in reviewing the denial of their claims. In the alternative, petitioners urged that the denial was arbitrary and capricious because respondents acted in complete disregard of their fiduciary obligations and without complying with the procedural requirements of ERISA.[2/]

[2/] The district court erroneously stated that petitioners conceded that the arbitrary and capricious standard of review was appropriate. As the district court itself noted, 608 F. Supp. at 669 n. 1 (App. B-7 n. 1), petitioners urged that this standard should not apply and assumed, for purposes of their alternative argument, that if the standard applied, the decision nevertheless was arbitrary and capricious.

On May 29, 1984, petitioners filed their notice of appeal to the court of appeals. On May 8, 1985, the panel issued its opinion affirming the judgment below. (App. A-1.) The panel found that "there is simply no authority for the proposition that procedural errors in an ERISA plan's management requires something other than the arbitrary and capricious standard of review." 759 F.2d at 1521 (App. A-7). Having reached the conclusion that it was bound to apply the arbitrary and capricious standard of review, the panel reviewed the denial of petitioners' claims for benefits and concluded that it was not arbitrary or capricious. The panel concluded that respondents' disavowal of ERISA's fiduciary obligations and their violation of ERISA's reporting, disclosure, and procedural requirements were not

probative of whether the decision was arbitrary or capricious. Id. at 1523 (App. A-17).

On May 1, 1985, the court of appeals denied petitioners' timely petition for rehearing and suggestion for rehearing en banc. (App. D-1.) Petitioners now seek a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, and respectfully urge this Court to review that judgment for the reasons which follow.

REASONS FOR GRANTING THE PETITION

I.

Application of the arbitrary and capricious standard of review should be premised upon compliance with the administrative, procedural, and fiduciary mandates of ERISA.

This case presents important questions

concerning the administration of ERISA plans and the role of the courts in reviewing employers' denials of claims for employee welfare benefits. In the 10 years since ERISA was enacted, the lower federal courts have utilized an arbitrary and capricious standard in reviewing the actions and decisions of employers, administrators, and other plan fiduciaries. This standard of review, which traditionally has been used to review decisions of trustees, is appropriate when the employer, administrator, or other plan fiduciary complies with the procedural protections mandated by ERISA. However, application of this deferential standard of review to a decision made without consideration of the fiduciary obligations and procedural protections of ERISA produces anomalous results.

In Massachusetts Mutual Life Insurance

Co. v. Russell, 53 U.S.L.W. 4938 (June 27, 1985), quoting Nachman Corp. v. Pension Benefit Guarantee Corp., 446 U.S. 359 (1980), this Court recognized that, in enacting ERISA, Congress crafted an "interlocking, interrelated and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'" 53 U.S.L.W. at 4942.

The court of appeals in this case failed to recognize that the fiduciary obligations and procedural requirements of ERISA are essential components of that "interlocking, interrelated and interdependent remedial scheme." Instead, the court divorced those fiduciary and procedural safeguards from respondents' substantive decision to deny severance benefits. As a result, the court attached no significance to the fact that the plan document and the summary of the

plan contained in an employee handbook did not identify a plan administrator or specify any procedure for designating an administrator, trustee, or any other named fiduciary as required by §§ 101(a)(1), 102, and 402(a), 29 U.S.C. §§ 1021(a)(1), 1022, and 1102(a). Further, the court noted, but gave no effect to the fact, that the plan documents did not identify the acceptance of work with a purchasing company as a circumstance which would result in ineligibility, or denial, or loss of benefits, which also is required by § 102(b), 29 U.S.C. § 1022(b). Further, the court of appeals acknowledged, but gave no effect to the fact, that respondents' denial of severance pay was without any consideration of the fiduciary duties imposed by § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

After acknowledging petitioners'

evidence and contentions in this regard, the court of appeals held: "Whatever the merits of plaintiffs' argument, there is simply no authority for the proposition that procedural errors in an ERISA plan's management requires something other than the arbitrary and capricious standard of review." 759 F.2d at 1521 (App. A-7). The panel erroneously concluded: "The statute provides for judicial review of benefit determinations under the Employee Retirement Income Security Act (ERISA) using the arbitrary and capricious standard." 759 F.2d at 1520-21 (App. A-5) (emphasis supplied). In fact, the arbitrary and capricious standard of review is not dictated by the statute; rather, the federal courts adopted that standard on the basis of Rehmar v. Smith, 555 F.2d 1362 (9th Cir. 1976).

In Rehmar, the Ninth Circuit explained the rationale and basis for this deferential standard of review:

> Where . . . the instrument defining the fiduciaries' duties gives them broad discretion, as is generally the case with welfare and pension trusts, the courts limit their review and intervene in the fiduciaries' decisions only where 'they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run.' . . . We find this standard of judicial review, which leads neither to abdication of traditional judicial control of fiduciaries nor to excessive judicial intervention in trust operations, in harmony with federal labor policy.

555 F.2d at 1371 (citations omitted). In Bayles v. Central States, Southeast and Southwest Areas Pension Fund, 602 F.2d 97, 99 (5th Cir. 1979), the court cited Rehmar with approval and utilized the deferential standard of review in an action to recover under a pension plan subject to ERISA.

Use of the arbitrary and capricious

standard to review an employer's denial of benefits under circumstances such as existed in this case -- in which an employer disavows its fiduciary obligations, denies that its benefit plan is subject to ERISA, and denies that its decisions are subject to any procedural safeguards -- emasculates the "interlocking, interrelated, and interdependent remedial scheme" of ERISA, contravenes the express intent and findings of Congress, and encourages employers to flout the procedural requirements without penalty.

In enacting ERISA, Congress found:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information

> with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

§ 2(b), 29 U.S.C. § 1001(b) (1982). As previously noted by this Court, "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefits plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

The requirements concerning reporting, disclosure, and fiduciary duties are straightforward. Section 102 of ERISA, 29 U.S.C. § 1022 (1982), requires that the plan description and summary plan description contain the name and address of the administrator, a description of the plan's requirements respecting the eligibility for participation, and a description of those

circumstances which may result in disqualification, ineligibility, or denial or loss of benefits. ERISA § 102 also requires a description of the procedures to be followed in presenting claims and the remedies available under the plan when claims are denied in whole or in part. The Department of Labor regulations provide that the plan description must not be "misleading," 29 C.F.R. § 2520.102-2(b), and must have "a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide. . . ." 29 C.F.R. § 2520.102-3(1). Most important, § 402(a), 29 U.S.C. § 1102(a) (1982), requires that every employee benefit plan identify

one or more named fiduciaries to control and manage the administration of the plan. Stanley Kase, the Ciba-Geigy executive who made the decision on petitioners' claims,[3/] was not a named fiduciary and was not aware that Ciba-Geigy's severance plan was governed by ERISA. As a result, he had no knowledge of his fiduciary duty to interpret that plan "solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits

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3/ Petitioners were advised after the sale that they would not receive severance pay. While the severance pay policy was set forth in an employee handbook, the handbook did not provide a mechanism for filing claims for severance pay or appealing claim denials. Thus, petitioners never filed formal claims for severance pay; rather, they were told during an employee meeting following the sale that a decision had been made not to pay severance pay to those employees who were hired by CTC.

to participants and their beneficiaries." § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (1982).

There is no logic or authority which should limit a reviewing court to the arbitrary and capricious standard when the decision being reviewed was not made pursuant to the statutory requirements. The "comprehensive and reticulated statute" ensures accountability, responsibility, and procedural fairness through its reporting, disclosure, and procedural requirements. In the circumstances of the present case, in which petitioners' claims were never considered by a proper fiduciary cognizant of his duties to evaluate the claims pursuant to the mandatory procedures of ERISA, the employer should not be permitted to cloak its actions behind the deferential arbitrary and capricious standard of review.

The arbitrary and capricious standard has become so entrenched in the body of cases which has arisen under ERISA that the lower federal courts now use that standard of review without questioning the basis for its application. See, e.g., Van Gunten v. Central States, Southeast and Southwest Areas Pension Fund, 672 F.2d 586, 587 (6th Cir. 1982); Peckham v. Board of Trustees, 653 F.2d 424, 426 (10th Cir. 1981). Indeed, the court of appeal's opinion in this case went so far as to assume that the statute itself required application of the arbitrary and capricious standard of review.

Petitioners urge this Court to grant their petition for a writ of certiorari and to provide the lower federal courts with definitive guidelines establishing when use of the arbitrary and capricious standard is appropriate. The facts of the present case

provide the Court with a clear opportunity to correct the misapplication of that standard when the decision under review was made in flagrant violation of ERISA's mandatory procedural requirements. Simply put, the reasons supporting a limited judicial review of the employers' denial of benefits evaporates under these circumstances.

II.

An employer's violations of administrative, procedural, and fiduciary obligations are probative of whether a claims denial was arbitrary or capricious.

The real prejudice to petitioners resulting from application of the arbitrary and capricious standard is exemplified by the conflict between the decision of the

Ninth Circuit in Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), and the decision of the Eleventh Circuit in the present case. The Eleventh Circuit first concluded that the arbitrary and capricious standard applied even though respondents violated the procedural requirements of ERISA; the court then disregarded those procedural violations and analyzed only the resulting decision to deny benefits. The court simply asked whether respondents' purported rationale in denying the claims was "arbitrary and capricious," and noted: "Under that highly deferential standard of review, this Court's role 'is limited to determining whether [Kase's] interpretation was made rationally and in good faith -- not whether it was right.'" 759 F.2d at 1522 (App. A-12, 13), quoting Griffis v. Delta Family-Care Disability and Survivorship

Plan, 723 F.2d 822, 825 (11th Cir.), cert. denied, 104 S. Ct. 3514 (1984). The court found that the language of the plan was susceptible of a number of interpretations and that respondents' interpretation constituted a "fair reading" of the plan. The court concluded, therefore, that petitioners "presented no evidence sufficient to establish that Kase's decision to deny severance pay was arbitrary and capricious." 759 F.2d at 1523 (App. A-17).

By contrast, in Blau, supra, the court recognized that procedural violations may work a substantive harm and produce an arbitrary and capricious result. In Blau, the Ninth Circuit was presented with facts remarkably similar to those considered by the Eleventh Circuit in the present case. There, employees were terminated when the division in which they worked was sold to

another company, and their claims for severance pay benefits under Del Monte's personnel policy were denied. The court noted that the employer, although it assumed the posture of administrator of an employee welfare benefit plan, made no attempt to comply with any of the duties that ERISA places upon a plan administrator. 748 F.2d at 1352. Further, the court found that Del Monte flouted the reporting, disclosure, and fiduciary obligations imposed by ERISA. The court held that Del Monte's decision to deny benefits "was made in the course of, and could have been infected by, these ERISA violations. Thus, the defendants' decision could not be said, as a matter of law, not to be arbitrary and capricious, and summary judgment was inappropriately granted to Del Monte at this stage of the proceedings." Id. at 1353.

The Ninth Circuit's analysis goes to the heart of petitioners' contentions in this case. That is, a plan participant whose claim is denied because of a fiduciary's failure to comply with ERISA's procedural requirements should be entitled to a remedy. The rationale of the Ninth Circuit is worth quoting at some length:

> Under ERISA, however, no great wall divides procedural from substantive violations. Although reporting and disclosure requirements are arguably procedural, it is these procedural requirements that alter the very balance of knowledge and rights between covered employees and their employer. . . . When procedural violations rise to the level that they have in this case, they alter the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally. The quantity of defendants' procedural violations may then work a substantive harm. Thus, in reviewing an administrator's decision, a court must consider continuing

> procedural violations in determining whether the decision to deny benefits in a particular case was arbitrary and capricious.

Id. at 1353-54. In contrast with the Ninth Circuit's analysis, the Eleventh Circuit in this case ignored widespread procedural violations in holding that respondents' decision was not arbitrary and capricious.

The Fourth Circuit apparently agrees with the Ninth Circuit that procedural violations may be probative of whether a claim denial was arbitrary or capricious. In Berry v. Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985), the court noted in dicta that ERISA "establishes basic procedures to protect plan participants from arbitrary decisions, among them a statement of reasons to the claimant for a denial of benefits and an appropriate internal procedure for review of adverse actions." 761 F.2d at 1007 n. 4. Due to the procedural posture of that

case, the Fourth Circuit noted that the issue should be resolved initially by the district court upon remand.

This case presents a ripe opportunity for the Court to resolve the conflict between the Ninth and Eleventh Circuits concerning whether procedural violations and disregard of fiduciary obligations give rise to a substantive remedy under ERISA. In Massachusetts Mutual Life Insurance Co. v. Russell, supra, the comments of Justice Brennan in his concurring opinion appear to be directly applicable to the issues presented by this case.

> To the extent the Court suggests that administrators might not be fully subject to strict fiduciary duties to participants and beneficiaries in the processing of their claims and to traditional trust-law remedies for breaches of those duties, I could not more strongly disagree. . . . The legislative history demonstrates that Congress intended by § 404(a) to

> incorporate the fiduciary standards of trust law into ERISA, and it is blackletter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits.

53 U.S.L.W. at 4943 (Brennan, White, Marshall, Blackmun, JJ., concurring) (footnote omitted) (emphasis added).

Confusion over the proper application of the arbitrary and capricious standard of review and uncertainty over the effect of procedural violations and breaches of fiduciary obligations have led to a fundamentally unfair result in this case. There is no question that petitioners' claims for severance pay were not decided in accordance with the procedural protections envisioned by ERISA, nor with proper regard for the fiduciary obligations imposed by that statute.

In order to realize the potentially devastating effect on the interests of

employees in their welfare benefit plans, the Court need only compare the result which would have been reached in this case under common law principles of contract. Under the common law of contracts, ambiguities in the plan's language would have been resolved against the drafter, with the result that, when more than one interpretation of the plan was permissible, that interpretation which was more favorable to the employee would have governed. See, e.g., C. A. Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163, 1165 (5th Cir. 1977). Under the rubric of an arbitrary and capricious standard of review, however, the courts below construed the ambiguity in Ciba-Geigy's plan in favor of respondents and against petitioners. Of course, Congress specifically provided that ERISA would preempt state common law. § 514, 29

U.S.C. § 1144 (1982). Nevertheless, it is impossible, in light of the legislative history and declaration of intent, to presume that ERISA was meant to jeopardize employee benefits which would be secured by mere application of the common law of contracts.

In Hayden v. Texas-U.S. Chemical Co., 557 F. Supp. 382 (E.D. Tex. 1983), the district court noted that it was bound by the holding in Bayles, supra, to apply an arbitrary or capricious standard of review. The court then offered these prophetic comments:

> That holding perplexes this court. It allows an employer to breach his employee's compensation contract with impunity, so long as the employee does not do so in an 'arbitrary or capricious' manner. The administrator may be stupid, or simply ignorant, or ill-advised on the meaning of the contract. No matter. He may breach and breach again, if the employee cannot enforce his rights.
>
> . . .
>
> By injecting the nebulous terms 'arbitrary and capricious' into the analysis of contracts,

> the court retards the rational resolution of disputes. Basic contract concepts and terms do not, of course, convey absolutely precise meaning. But they carry substantially more meaning than the slippery concept of 'arbitrary and capricious.' Requiring that 'standard' of review makes for a paucity of legal analysis. It substitutes conclusory phrases for specific supporting factual determinations.

557 F. Supp. at 389-90. See also Lee v. Dayton Power and Light Co., 604 F. Supp. 987, 1001 and 1001 n. 11 (S.D. Ohio 1985), in which the court questioned the rationale of the arbitrary and capricious standard in light of ERISA's statutory scheme.

If the arbitrary and capricious standard applies under the facts of the present case, then, at the very least, that standard requires that individuals who determine eligibility for plan benefits should be identified and required to consider all relevant factors, including their statutorily imposed fiduciary

responsibilities. The requirement that fiduciaries be designated in an employee welfare benefit plan, § 402(a), 29 U.S.C. § 1102(a) (1982), serves the vital purpose of putting those individuals on notice that they are not merely employees with loyalties to their employer, but that they have additional responsibilities and loyalties to the participants of the plan. See § 404, 29 U.S.C. § 1104. When those responsibilities are fulfilled, and a decision is made by a true fiduciary, the decision may be upheld under the arbitrary and capricious standard. Here, however, the denial of petitioners' claims was patently a business decision made solely in the interest of Ciba-Geigy. Thus, respondents' procedural violations resulted in a decision which caused substantive harm to petitioners. Under a "comprehensive and reticulated

statute," those procedural violations cannot be ignored; and the resulting decision should not be allowed to stand under the arbitrary and capricious or any other standard of review.

CONCLUSION

Petitioners respectfully urge this Court to grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit (a) to correct the misapplication of the arbitrary and capricious standard of review in circumstances such as exist here, and (b) to resolve the conflict between the Ninth and Eleventh Circuits by deciding whether fiduciary and procedural violations are probative of whether a particular claim denial was arbitrary and capricious.

Respectfully submitted,

Melburne D. McLendon, P.C.,
Counsel of Record

H. Sanders Carter, Jr.
Anthony J. McGinley

CARTER, ANSLEY, SMITH &
McLENDON
1810 First Atlanta Tower
Atlanta, Georgia, 30383
(404) 658-9220

ATTORNEYS FOR PETITIONERS

APPENDICES

APPENDIX A

Braxton H. ANDERSON, et al.,
Plaintiffs-Appellants,

v.

CIBA-GEIGY CORPORATION, et al.,
Defendants-Appellees.

No. 84-4444.

United States Court of Appeals,
Eleventh Circuit

May 8, 1985.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY and HILL, Circuit Judges, and TUTTLE, Senior Circuit Judge.

RONEY, Circuit Judge:

The issue in this ERISA action is whether severance pay must be given employees whose corporate subdivision is sold in its entirety to a purchasing corporation, which agrees to retain those

employees at their same jobs and salaries, but without accrued seniority rights or vacation benefits. The district court granted defendants' motion for summary judgment. Plaintiffs appeal. We affirm.

Plaintiffs are all former employees of Ciba-Geigy Corporation. They worked for the REN Telecommunications Division, which was part of the Applied Plastics Division of Ciba-Geigy. As such, plaintiffs were covered by Ciba-Geigy's Employee Benefit Plan. This ERISA plan provided that Ciba-Geigy employees terminated for reasons other than cause would be entitled to severance pay in the amount of two weeks pay for each year or fraction of a year worked for Ciba-Geigy. Termination for reasons other than cause was defined as termination "initiated by the Company for reasons beyond the control of the employee (e.g.,

reorganization, budgetary cutbacks, lack of work, ...)." The Plan defined severance pay as "payments made to an employee when the Company terminates the employer-employee relationship unless the employee has been discharged or special contractual arrangements provide otherwise." As an exception to this general severance pay provision, section 2.9.2 of the Plan provided that "[t]his policy shall not be applicable in any special situation (such as the relocation of a major operating unit) where the Corporate Management Committee deems it necessary to establish a separate policy applicable to that situation only."

The question in this case is whether the facts present such "special situations." The Applied Plastics Division was reorganized in early 1981. As part of that reorganization, REN Telecommunications

Division (REN) was sold in its entirety to Communications Technology Corporation (Communications). In its purchasing contract, Communications specifically disclaimed any liability for claims by any former Ciba-Geigy employees relating to events transpiring prior to sale.

Communications never made plaintiffs a formal offer of employment. When plaintiffs reported to work on July 22, 1981, they discovered they had a new employer. Although Communications retained plaintiffs at their same salaries and job positions, they lost their seniority rights and vacation benefits. Stanley Kase, the Ciba-Geigy executive who interpreted the Plan, testified that he decided that plaintiffs were not entitled to severance pay because no "termination" was involved, and because the Plan specifically exempted

"special situations" from its provisions. The sale of REN was seen as a "special situation."

[1] The first issue concerns the standard of review to be given Kase's no severance pay determination. The statute provides for judicial review of benefit determinations under the Employee Retirement Income Security Act (ERISA) using the arbitrary and capricious standard. 29 U.S.C.A. §§ 1001 et seq. See Griffis v. Delta Family-Care Disability, 723 F.2d 822, 825 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 3514, 82 L.Ed.2d 823 (1984); Bayles v. Central States, Southeast and Southwest Pension Fund, 602 F.2d 97, 99 (5th Cir. 1979). Plaintiffs argue that statutory standard does not apply to Kase's decision here for three reasons. First, the plan document and the summary of the plan

contained in the employee handbook do not identify an administrator of the plan or specify any procedure for designating an administrator, trustee, or other fiduciary as required by section 1022. The plan documents do not state that the termination of an employee who went to work for a purchasing company at the same job and salary constitutes a circumstance which may result in ineligibility, or denial or loss of benefits, as required by section 1022. Second, Kase, who made the decision that plaintiffs were not entitled to severance pay, was not a named fiduciary and did not have authority to act as a fiduciary with respect to the plan. Third, defendants initially denied that the severance pay plan was an employee welfare benefit plan governed by ERISA and, therefore, the decision concerning plaintiffs' entitlement

to severance pay was made without any consideration of the fiduciary duties imposed by section 1104 of ERISA.

Whatever the merits of plaintiffs' argument, there is simply no authority for the proposition that procedural errors in an ERISA plan's management requires something other than the arbitrary and capricious standard of review. On the contrary, in a case where ERISA's provisions were "flouted" in a "wholesale and flagrant manner," the arbitrary and capricious standard was still applied, although the court did note that it was not deciding that the arbitrary and capricious standard was the only standard that could be used. Blau v. Del Monte Corp., 748 F.2d 1348, 1352-53 (9th Cir.1984). See also Dennard v. Richards Group, Inc., 681 F.2d 306, 313 (5th Cir. 1982), and cases cited therein.

The next issue is whether Kase's decision to deny severance pay benefits was arbitrary and capricious. Kase testified that he made his decision on what are essentially two grounds: first, that plaintiffs were never "terminated," and second, that he considered REN's sale to be a "special situation" under section 2.9.2 of the Plan, justifying the withholding of severance pay.

[2] The first reason is probably legally wrong. While it is true that plaintiffs never suffered a termination of actual employment--they were, after all, never unemployed--Ciba-Geigy's Employee Benefit Plan does not define "termination" in that manner. The Plan provided that severance pay would be provided to those employees terminated for reasons "other than cause." A specific example of a reason "other than cause" was listed as corporate

"reorganization." The sale of REN was part of a corporate reorganization. Severance pay is defined in the Plan as "payments made to an employee when the Company terminates the employer-employee relationship...." The sale of REN terminated the employer-employee relationship between Ciba-Geigy and plaintiffs. Termination may have been one of "form not substance," but it is clear that the "form" of termination is the controlling factor under Ciba-Geigy's own definition of the word. The Plan never specified a period of unemployment as a condition precedent to receiving severance pay benefits. Cf. Sly v. P.R. Mallory & Co., Inc., 712 F.2d 1209, 1212 (7th Cir.1983). Plaintiffs were "terminated" for severance pay purposes. See Blau v. Del Monte Corp., 748 F.2d 1348, 1354-55 (9th Cir.1984).

Plaintiffs claim that Kase had no authority to invoke section 2.9.2, because it provides that the Corporate Management Committee is the entity to decide that "it is necessary to establish a separate policy applicable" to a special situation.

The Corporate Management Committee was succeeded by the Executive Committee. According to deposition testimony, the Executive Committee delegated this authority to Dr. Jack Schneller, president of the Plastics and Additives Division, who in turn delegated authority over all personnel matters connected to the REN sale to Kase.

[3] There is no written record of this purported three-tier delegation. At each step the delegation was made orally. Nevertheless, the district court could properly conclude that plaintiffs failed to meet their burden of proof on the contention

that this was an improper delegation of authority. Thus, Kase had the properly delegated authority to invoke section 2.9.2. No law has been cited to question the propriety of the oral delegation. The Plan is silent as to how fiduciary responsibility for its implementation should be delegated, and ERISA states only that fiduciary duties themselves may be delegated. 29 U.S.C.A. § 1105(c)(1)(B). Plaintiffs argue that Kase was not a named fiduciary and thus could not possibly act with respect to the Plan. Yet ERISA establishes that even though not a named fiduciary,

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any

> authority or control respecting management or disposition of its assets ... or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.A. § 1002(21)(A). See also Eaves v. Penn, 587 F.2d 453, 458-59 (10th Cir.1978); Fulk v. Bagley, 88 F.R.D. 153, 161-62 (M.D.N.C.1980); Freund v. Marshall and Ilsley Bank, 485 F.Supp. 629, 635 (W.D.Wis.1979). Thus whatever his title, or whether he was named as a fiduciary or not, Kase was acting as a fiduciary when making his no severance pay determination.

[4-6] The final issue is whether Kase's decision to apply section 2.9.2 to plaintiffs in the sale of REN Telecommunications was arbitrary and capricious. Under that highly deferential

standard of review, this Court's role "is limited to determining whether [Kase's] interpretation was made rationally and in good faith--not whether it was right." Griffis v. Delta Family-Care Disability, 723 F.2d 822, 825 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 3514, 82 L.Ed.2d 823 (1984) (quoting Riley v. MEBA Pension Trust, 570 F.2d 406, 410 (2d Cir.1977)).

In Dennard v. Richards Group, Inc., 681 F.2d 306 (5th Cir.1982), the court listed several factors to consider in applying the arbitrary and capricious standard to ERISA claims: "(1) uniformity of construction; (2) 'fair reading' and reasonableness of that reading; and (3) unanticipated costs." Id. at 314 (footnote omitted). Further evidence of the good faith of the administrator was said to be found in: "(1) internal consistency of a plan under the

interpretation given by the administrators or trustees; (2) any relevant regulations formulated by the appropriate administrative agencies ...; and (3) factual background of the determination by a plan and inferences of lack of good faith, if any." Id. While not all these factors can be applied to the instant situation, it is clear that none has been obviously infringed.

The general language of section 2.9.2 leaves it open to a broad discretion in a number of interpretations that would constitute a "fair reading." Plaintiffs did keep their jobs at full pay during difficult economic times. The Plan was consistently interpreted because in every other divestment situation where Ciba-Geigy employees were retained in their old positions by the purchasing entity, no severance pay was given. Nothing in the

record indicates Kase acted in anything other than good faith. True, plaintiffs did lose certain benefits and Ciba-Geigy gained in that it did not have to pay out from its ERISA fund, but Kase did nothing that could be characterized as having been done in bad faith. Evenhandedness of treatment is evidence of good faith. See e.g. Paris v. Wolf, Inc. Profits Sharing Plan, 637 F.2d 357, 362 (5th Cir.), cert. denied, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981).

Furthermore, plaintiffs were on notice that they might not receive severance benefits. Not only was section 2.9.2 in their employee handbooks, but Ciba-Geigy implicitly said that no benefits would be given those employees accepted by the purchaser when replying to employees' questions regarding the then inchoate sale plans for REN Telecommunications:

1. For those employees who are not transferable to new owners, what will be the termination, severance pay policy?

   Term. Policy 7.1

   --Reasons other than cause

   --Notice-Min. 2 wks

   --Severance-2 wks/yr.serv.

   --Extended medical coverage/severance period.

(emphasis supplied).

The wording of this question and answer suggests that employees who are transferable to a purchaser would not receive severance pay.

The two cases most factually similar to the instant case, Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir.1984) and Sly v. P. R. Mallory & Co., Inc., 712 F.2d 1209 (7th Cir.1983), came to two different

conclusions. Blau found arbitrary and capricious behavior on the part of the administrator and Sly did not. Both, however, are distinguishable from this controversy because neither involved a "special situation" provision like this plan.

In sum, plaintiffs have presented no evidence sufficient to establish that Kase's decision to deny severance pay was arbitrary and capricious. Even though plaintiffs have suffered an "injury" through a loss of some benefits, neither ERISA nor the Ciba-Geigy Employee Benefit Plan has been violated.

AFFIRMED.

APPENDIX B

B-1

Braxton H. ANDERSON, et al.,
Plaintiffs

v.

CIBA-GEIGY CORPORATION, et al.,
Defendants

No. C83-0068A

United States District Court,
N.D. Georgia,
Atlanta Division.

April 26, 1984.

ORDER OF COURT

MOYE, Chief Judge.

The above-styled ERISA action is before the Court on the defendants' motion for summary judgment and the plaintiffs' motion for partial summary judgment. The parties agree that the issue of liability is one of law that can be decided on cross-motions for summary judgment.

Statement of Facts

The plaintiffs in this action are former employees of defendant Ciba-Geigy Corporation which is incorporated in New York. Ciba-Geigy offers its employees various benefits including severance pay. The rules relating to these benefits are set out in Ciba-Geigy's corporate Personnel Policy No. 7.1 dated June 1, 1972, and amended on March 15, 1981. This Plan, which the defendants concede is covered by ERISA, provided the Ciba-Geigy employees who were terminated for reasons other than cause would be entitled to severance pay in the amount of two weeks pay for each year or fraction of a year worked for Ciba-Geigy. Termination for reasons other than cause was defined as termination "initiated by the Company for reasons beyond the control of the employee (e.g., reorganization,

budgetary cutback, lack of work...." The Plan defined severance pay as "payments made to an employee when the Company terminates the employer-employee relationship unless the employee has been discharged or special contractual arrangements provide otherwise." The Plan also provided for an exception to the general provisions regarding severance pay. This exception provided that "[t]his policy shall not be applicable in any special situation (such as the relocation of a major Operating Unit) where the Corporate Management Committee deems it necessary to establish a separate policy applicable to that situation only." It is undisputed that the plaintiffs in this action were covered by these severance pay provisions.

The plaintiffs worked for the Ren Telecommunications Division which was part

of the Applied Plastics Division of Ciba-Geigy. In early 1981, Ciba-Geigy executive, Jack Schneller decided to reorganize part of the Applied Plastic Division by selling the entire Ren Telecommunications Division. Schneller decided to sell this Division as an ongoing concern, including a transfer of the existing employees to the acquiring company. On July 21, 1981, Communications Technology Corporation (CTC) purchased the Ren Telecommunications Division from Ciba-Geigy. CTC specifically disclaimed any liability for claims by any former Ciba-Geigy employee which accrued prior to the sale. In addition, CTC never made any formal offer of employment to the plaintiffs. Rather, the plaintiffs reported to work on July 22, 1981, and found out that they had a new employer. Although the

plaintiffs were retained by CTC at their same salaries and job positions they had at Ciba-Geigy, they claim that they lost benefits that had been provided by Ciba-Geigy, including lost vacation time and seniority status. In Count I of their complaint, the plaintiffs claim that they are entitled to severance pay under the provisions of the Plan because they are no longer working for Ciba-Geigy. In Count VI of their complaint, the plaintiffs claim that they are entitled to these benefits under the federal common law. The Ciba-Geigy executive who interpreted the Plan decided that the plaintiffs were not entitled to any severance pay because their termination was one of form not of substance and because the Plan specifically exempted "special situations" from its provisions and the sale of the Telecommunciations Division

constituted such a "special situation."

Discussion

[1] The plaintiffs concede that the proper standard of review for the purposes of the present motions is the arbitrary and capricious standard. Plaintiffs' Brief at 18, Fn. 1. Accordingly, this Court is bound by the decision of the Plan Administrators unless that decision was arbitrary, fraudulent, or rendered in bad faith. Sly v. P. R. Mallory & Co., Inc., 712 F.2d 1209 (7th Cir.1983). And, the Eleventh Circuit has recently stated that the Court's role "is limited to determining whether the [administrators'] interpretation was made rationally and in good faith--not whether it was right." Griffis v. Delta Family Care

Disability, 723 F.2d 822 (11th Cir.1984).[1]

The defendants argue that the plaintiffs are not entitled to severance pay because the wholesale transfer of the Ren Telecommunications Division to CTC constituted a "special situation" as defined in the Plan's guidelines and that Ciba-Geigy formulated a separate policy applicable to this special situation. In response to the plaintiffs' argument that no special policy was formulated in this case, the defendants

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1. The plaintiffs seem to question whether this standard should apply to this case because the decision not to provide severance pay to the plaintiffs was allegedly not made by the plan administrators. The plaintiffs do not pursue this argument, however, and as noted above, concede that the arbitrary and capricious standard applies.

claim that Ciba-Geigy's Executive Committee delegated the authority to interpret the Plan to Jack Schneller who, in turn, delegated the authority to Stanley Kase, Director of Human Resources for Ciba-Geigy.[2] In his deposition, Kase states that he decided that it was proper to formulate a separate policy regarding the applicability of the severance pay provisions to the sale of the Ren Telecommunications Division. Kase

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2. The plaintiffs argue that this delegation of authority violated ERISA. This Court finds that the plaintiffs have not met their burden of proof on this issue.

Deposition at 70-71; 78-79.[3] Kase decided that the employees were not entitled to severance pay because they remained at their same jobs at their same salaries. This decision can only be overturned if it was made arbitrarily or capriciously.

Another Court has previously addressed the identical issue now facing this Court. In Rynar v. Ciba-Geigy Corp., 560 F.Supp. 619 (N.D.Ill.1983), another Ciba-Geigy employee sued the corporation for severance pay when his entire division was sold to

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3. The plaintiffs argue that since Schneller stated in his deposition that he didn't feel a separate policy was necessary, the defendants did not, in fact, create a separate policy. This argument carries little weight because it was Kase who made the decisions concerning severance pay and he testified that he did feel that a separate policy was necessary in this case.

another company. The severance pay provisions at issue in Rynar were the same ones that are in issue in the present controversy. The Court in Rynar held that Ciba-Geigy did not act arbitrarily or capriciously in denying severance pay to Rynar when he remained at his same job after the sale of his division. The Court summed up its holding as follows:

> The reference in Section 2.9.2 to any "special situation" suggests that further limitations upon the payment of severance benefits were within the discretion of Ciba's personnel officers. We conclude that Ciba did not abuse its authority to determine the propriety of severance pay ... where it is undisputed that Rynar accepted an equivalent position with the buyer of the division of Ciba for which he

> worked, and where Rynar suffered no significant economic loss as a result of the substitution of one employer for the other. Id. at 626.

The Rynar Court also addressed the argument that Ciba-Geigy's policy provisions are ambiguous and must be construed against Ciba-Geigy. The Court noted that this principle rests upon general contract law which is preempted by federal ERISA law. In fact, as the Rynar Court also noted, the principle that ambiguities in a contract must be interpreted against the employer is inconsistent with the arbitrary and capricious standard of review applicable to ERISA cases.

The plaintiffs attempt to distinguish Rynar in two ways. First, they argue that much of the deposition testimony that is before this Court was not before the Court

in Rynar. The plaintiffs contend that this evidence shows that Ciba-Geigy did not treat the sale of the Ren Division as a "special situation" under the policy provisions and, therefore, Ciba-Geigy cannot justify its treatment of the plaintiffs by reference to that section of the Pension Plan. Secondly, the plaintiffs argue that by losing seniority status and vacation time, they did suffer significant economic loss as a result of the sale of their division.

Stanley Kase testified that he relied on the "special situation" section of the Plan when he decided not to award severance pay to the plaintiffs. Kase deposition at 70-71, 78-79. This testimony contradicts the plaintiffs' assertion that Ciba-Geigy did not treat the divestiture as a "special situation." In addition, the "special situation" provision of the Plan put the

plaintiffs on notice that Ciba-Geigy had the discretion to deny them severance pay in a variety of situations. This Court cannot say that the decision to deny severance pay in this particular situation, where the employees kept their same jobs at the same pay, was arbitrary or capricious.

The plaintiffs allege that, unlike the plaintiff in Rynar, they have suffered significant economic harm as a result of the sale of their division to CTC. The plaintiffs state that they "lost all seniority rights and all accrued protection against involuntary termination." Plaintiffs' Brief in Response to Defendants' Motion for Summary Judgment at 11. The plaintiffs do not, however, enumerate these "seniority rights" nor do they detail what "accrued protection" they had obtained against involuntary termination. In

addition, the plaintiffs have not shown this Court that the plaintiff in Rynar did not also lose these same benefits. In any event, the degree of economic harm suffered by the plaintiffs does not address the argument that the Plan specifically provided that Ciba-Geigy could adopt a special policy for situations that warranted one and that the wholesale transfer of one division constituted such a special situation. This Court feels that the Court's analysis in Rynar is equally applicable to the present case.

The Seventh Circuit Court of Appeals recently dealt with almost the identical issue facing this Court and resolved it in favor of the plan administrators. Sly v. P.R. Mallory & Co., Inc., 712 F.2d 1209 (7th Cir.1983). The plaintiffs in Sly were two employees who worked for a division which

was sold to another company. The plaintiffs continued to work for the purchaser of the division at the same jobs and equal salaries. The plan at issue provided that employees "whose services are involuntarily terminated for the convenience of the company," would receive severance pay. Id. at 1212. The plaintiffs claimed that they were terminated and that they had a "vested interest in . . . payment of their accrued severance benefits." Id. The Seventh Circuit panel cited with approval the district court's holding that the plaintiffs were not entitled to both their new jobs and their severance pay. The district court stated that:

> The denial of severance pay to employees who accepted their old positions with the purchaser was

> not arbitrary or capricious. Severance pay is generally intended to tide an employee over while seeking a new job and should be considered an unemployment benefit. . . . To award severance benefits under these facts would result in a windfall to the employees who retained their positions with the purchaser of the going concern, which was clearly not the intention or goal of . . . ERISA. See Sly at 1211.[4]

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4. The Plan in Sly also contained a provision whereby all "terminated" employees would be placed on a leave of absence before receiving severance pay. The plaintiffs in Sly were not placed on such leave and, thus, did not meet the requirements of the Plan. Although this fact does, to some extent, distinguish Sly from the present case, the policy considerations that the Sly court relied on are equally applicable to the present controversy. It is also interesting to note that the Court in Sly observed that the fringe benefits that the purchaser company provided to the plaintiffs were "admittedly less than the [defendants'] benefits." Id. at 1212.

The issue before this Court is a very difficult one. In addition to the cases already discussed, there is an abundance of case law, both state and federal, dealing with the situation where one division of a company is sold in toto to another company and the employees of the old company demand severance pay or other benefits promised by the old company. E.g., Livernois v. Warner-Lambert Co., Inc., 723 F.2d 1148 (4th Cir.1983); Chapin v. Fairchild Camera Instrument Corp., 31 Cal.App.3d 192, 107 Cal.Rptr. 111, 115 (1973); Adams v. Jersey Central Power & Light Co., 36 N.J.Super. 53, 114 A.2d 776 (1955); Younger v. Thomas International Corp., 275 Ark. 327, 629 S.W.2d 294 (1982). Some of these cases have arisen under state contract law and some under ERISA. The state courts, which have reached the merits of these cases de novo,

have reached conflicting results depending on the specific policies in question and the philosophy of each particular court. Compare Chapin, supra with Younger, supra. This Court, however, is not free to decide this case based on a de novo review of the record. Rather, the inquiry is limited to whether Ciba-Geigy's decision not to grant severance benefits to the plaintiffs was arbitrary or capricious. It is undisputed that the plaintiffs were hired by CTC at their same salaries and job positions. In light of the fact that the Plan contained a specific exception to the general provisions regarding severance pay and that there are competing equities as to the desirability of awarding severance pay in situations where the employees keep their same jobs at their same salaries, this Court cannot say that

Ciba-Geigy's decision was arbitrary or capricious. Accordingly, this Court feels that the defendants' motion for summary judgment on Count I of the plaintiffs' complaint should be granted.

[2] The plaintiffs have alleged that they are entitled to severance pay under the federal common law of ERISA. This allegation was originally stated in Count VI of the plaintiffs' complaint and survived the defendants' motion to dismiss only to the extent that it did not allege a state cause of action. See Order dated September 13, 1983. The plaintiffs have not alleged any facts or theories, however, to convince this Court that Count VI states anything other than a state contract action. Since ERISA preempts state contract law, see Lafferty v. Solar Turbines International, 666 F.2d 408 (9th Cir.1982), the defendants are entitled to summary judgment on Count VI

of the plaintiffs' complaint.

In sum, this Court holds that the defendants did not act arbitrarily or capriciously in denying severance pay to the plaintiffs. Accordingly, the defendants' motion for summary judgment as to all issues is hereby GRANTED. The plaintiffs' motion for summary judgment is hereby DENIED. This order resolves all of the issues in this case.

SO ORDERED, this 26 day of April, 1984.

/s/ Charles A. Moye, Jr.
United States District Judge

APPENDIX C

C-1

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8444

D. C. Docket No. 83-68

BRAXTON H. ANDERSON, et al.,

Plaintiffs-Appellants

Versus

CIBA-GEIGY CORPORATION, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Georgia

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Before RONEY and HILL, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by

counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 8, 1985

For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: July 9, 1985

APPENDIX D

D-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8444

BRAXTON H. ANDERSON, et al.,

Plaintiffs-Appellants

Versus

CIBA-GEIGY CORPORATION, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 8, 11 Cir., 1985, ___F.2d ____).
(July 1, 1985)

Before RONEY and HILL, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

APPENDIX E

THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)

ERISA, § 2(b), 88 Stat. 832 (1974), 29 U.S.C. § 1001(b) (1982):

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA, § 101(a)(1), 88 Stat. 840 (1974), 29 U.S.C. § 1021(a)(1) (1982):

> (a) Summary plan description and information to be furnished to participants and beneficiaries.
>
> The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan --(1) a summary plan description described in section 1022(a)(1) of this title; and (2) the information described in section 1024(b)(3) and 1025(a) and (c) of this title.

ERISA, § 102, 88 Stat. 841 (1974), 29 U.S.C. § 1022 (1982):

> (a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection

(b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary

plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or

denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 113 of this title).

ERISA, § 402(a), 88 Stat. 875, 29 U.S.C. § 1102(a) (1982):

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary. . . .

ERISA, § 404(a)(1)(A), 88 Stat. 877, 29 U.S.C. § 1104(a)(1)(A) (1982):

> (a) Prudent man standard of care
>
> (1) Subject to section 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan; . . . .

REGULATIONS

29 C.F.R. § 2520.102-2(a),(b), 42 Fed. Reg. 37180 (July 19, 1977):

§2520.102-2 Style and format of summary plan description.

(a) Method of presentation. The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the

complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross references and a table of contents.

(b) General format. The format of the summary plan description must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions

of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

29 C.F.R. § 2520.102-3(1), 42 Fed. Reg. 37180 (July 19, 1977):

§ 2520.102-3 Contents of summary plan description.

Section 102 of the Act specifies information that must be included in the summary plan description. The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed. The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in paragraph (j) through (n):

. . .

(l) For both pension and welfare benefit plans, a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

No. 85-566

Supreme Court, U.S.
FILED
OCT 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

BRAXTON H. ANDERSEN, FRANK KENNETH BASINGER, PAMELA E. JOHNSON, PATRICIA L. MURPH, RICHARD B. PETERSON, SHIRLEY SHARP, ROBERT V. TUCKER, RONALD D. YOST, VERLINE BRYANT, SHARON DOVER, NORMA L. FANNING, JOY HARRIS, JOSEY JARRETT, EMMA JOHNSTON, ROBERT LEE KEATON, KATHY NEALEY, WALTER NEALEY, MICHAEL L. NYSTROM, ELBERT PAYNE, RUBY C. PAYNE, LOUETTA DAVIS RAYMOND and LOUIE A. HERMAN,

Petitioners,

v.

CIBA-GEIGY CORPORATION; EMPLOYEE BENEFIT PLAN OF CIBA-GEIGY CORPORATION; CORPORATE EMPLOYEE BENEFIT COMMITTEE, CIBA-GEIGY CORPORATION; ROBERT HOCHHAUSER, ROY W. LAWRENCE, GEORGE H. STEWART, DR. CHARLES E. ZIEGLER, WILLIAM H. EBERT, JOHN MINCY, MICHAEL WHELAN, STANLEY KASE, JOHN MULLINS, JOHN O'CONNOR and STANLEY SHERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

THEOPHIL C. KAMMHOLZ
(Counsel of Record)
CHARLES B. WOLF
EDWARD C. JEPSON, JR.
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200
Counsel for Respondents

Of Counsel:
VEDDER, PRICE, KAUFMAN &
KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200

October 30, 1985

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QUESTION PRESENTED

Whether the court below correctly applied the "arbitrary and capricious" standard of review to CIBA-GEIGY's decision not to pay severance pay to former employees who continued their employment with the successor employer.

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners ask this Court to review a decision of the Court of Appeals for the Eleventh Circuit which upheld entry of summary judgment in favor of Respondents on Petitioners' claim for severance pay arising from the sale of the business

unit in which Petitioners were employed. Petitioners contend that the decision below is erroneous and that it conflicts with a decision of the Ninth Circuit Court of Appeals. As discussed more fully herein, however, the Eleventh Circuit's decision is correct and consistent with all applicable case law, including that of the Ninth Circuit. The petition for a writ of certiorari should be denied.

A. The Sale Of The REN Telecommunications Group

CIBA-GEIGY Corporation ("CIBA-GEIGY")[1] is composed of several operating divisions in the United States. Prior to July 21, 1981 one of those divisions contained the REN Telecommunications Group headquartered in Atlanta, Georgia. On July 21, 1981 most of REN's assets were sold to Communications Technology Corporation ("CTC") as a going concern. The purchase agreement provided that CTC would offer continued employment to CIBA-GEIGY employees listed in a schedule attached to the agreement.

All Petitioners were CIBA-GEIGY employees who continued in their same or similar positions with CTC after July 21, 1981 without reduction in their wages.

Employees not offered employment by CTC received severance pay in accordance with CIBA-GEIGY's severance pay policy; Petitioners, who continued in employment without interruption, did not.

B. CIBA-GEIGY's Severance Pay Policy And Its Application To The REN Divestiture

The termination pay policy for salaried employees maintained by CIBA-GEIGY in 1981 was intended to bridge the

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[1] As required by Rule 28.1 Respondents note that 100% of the stock of Respondent CIBA-GEIGY Corporation is owned by CIBA-GEIGY International Ltd., a Swiss corporation, and CIBA-GEIGY, Ltd., a Swiss corporation. Ilford, Inc. and Mettler Instruments Corporation are affiliates of CIBA-GEIGY Corporation.

economic gap caused by loss of employment as a form of unemployment compensation.[2]

In general, the policy provides for or denies benefits depending upon the reason for termination of employment. Employees terminated for reasons other than cause normally are entitled to two weeks' pay for each year of Company service. However, Section 2.9.2 of the policy states:

> This policy shall not be applicable in any special situation (such as the relocation of a major Operating Unit) where the Corporate Management Committee deems it necessary to establish a separate policy applicable to that situation only (A. 3).[3]

CIBA-GEIGY also maintains an employee handbook which contains a section on Termination of Employment summarizing the corresponding formal personnel policies. The handbook specifically states that "in special situations, such as a mass move of an operating unit, a separate policy covering terminations and severance payments will be established." These handbooks were distributed to employees and almost all Petitioners received them (A. 15).

The decision to deny severance benefits to those who continued in employment with CTC was made by CIBA-GEIGY's New York management. The Executive Committee (successor to the Corporate Management Committee referred

---

[2] However, under normal circumstances, the Company did not disqualify persons who found other employment if otherwise eligible. The absence from CIBA-GEIGY's policy of an express exception for situations in which an otherwise eligible employee has found other employment does not alter the purpose of the policy. In normal circumstances, a terminated employee does not know whether, if ever, he will be reemployed. Such an exception would be difficult or impossible to administer and would create an undesirable disincentive to former employees who should be actively seeking new jobs. See also *Holland* v. *Burlington Industries, Inc.*, ____ F.2d____, 6 E.B.C. 2129, 2136 (4th Cir. 1985).

[3] References to "A. ____" and "B. ____" are to pages in Appendices A and B to the petition for a writ of certiorari.

to in the termination policy) delegated authority to Dr. Schneller, President of the operating division, to divest REN, including the necessary authority to apply the termination and severance benefit policy. Schneller, in turn, delegated his authority to apply the severance pay and other personnel policies to Stanley Kase, the division's Director of Human Resources (A. 10).

Kase exercised this delegated authority, determining that the Petitioners and all other employees who continued their employment with CTC were not entitled to receive severance pay. He believed that the divestiture of REN constituted a "special situation" of the type which Section 2.9.2 expressly excepted from the termination policy's general provisions (A. 4-A. 5).

This application of the policy was consistent with its application to other CIBA-GEIGY divestitures. In all these situations, severance pay has not been paid to employees who continued in employment with the successor (A. 14).

C. Proceedings In The District Court And The Court Of Appeals

On January 18, 1983, Petitioners commenced this action for severance benefits in the District Court for the Northern District of Georgia seeking severance pay under the Company's termination policy. Jurisdiction was based on the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(e)(1).

On February 15, 1984, Petitioners and Respondents filed cross-motions for summary judgment. On April 26, 1984 the District Court granted Respondents' motion and denied Petitioners' motion because, under the controlling legal standard, Respondents "did not act arbitrarily and capriciously in denying severance pay to Plaintiffs" (B. 20).

On appeal to the Eleventh Circuit, Petitioners changed the focus of their argument. Although they had argued below that Respondents' severance pay decision was arbitrary and capricious, on appeal they argued primarily that the arbitrary and capricious standard of review did not apply because Respondents allegedly violated some ERISA procedural requirements.

On May 8, 1985, the Eleventh Circuit affirmed. The court rejected Petitioners' argument that procedural errors in the management of an ERISA plan require application of something other than the arbitrary and capricious standard of review (A. 7-A. 8). After examining Petitioner's various arguments, including allegations of non-compliance with ERISA procedures, the court concluded there was no evidence to establish that Kase's decision was arbitrary, capricious or in bad faith (A. 14-A. 15).

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc on May 28, 1985. It was denied on July 1, 1985.

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Correctly Identified And Resolved The Issues In This Case Based On Well Established Law.

It is settled law that the "arbitrary and capricious" standard, applied by the Eleventh Circuit to review the denial of severance pay here, is the proper standard for judicial review of benefit determinations under ERISA. Pursuant to this standard, Petitioners must show that Respondents acted arbitrarily, capriciously or in bad faith in failing to pay them severance benefits. See, *e.g., Griffis* v. *Delta Family-Care Disability,* 723 F.2d 822, 825 (11th Cir.) *cert. denied,* 104 S.Ct. 3514 (1984); *Martinez* v. *Swift & Co.,* 656 F.2d 262 (7th Cir. 1981); *Bayles* v. *Central States, Southeast & Southwest Areas Pension Fund,* 602 F.2d 97, 99 (5th Cir. 1979).

Indeed, Petitioners concede that this is the established standard of review in such cases (Petition, p. 22).

This standard requires a court to enforce the decision of a plan administrator or trustee "even though the court may disagree with it, so long as the decision is not arbitrary or capricious" or made in bad faith. *Sharron* v. *Amalgamated Ins. Agency Services, Inc.,* 704 F.2d 562, 564 (11th Cir. 1983). In applying this standard, courts recognize that:

> "[the] judicial role is limited to determining whether the [committee's] interpretation was made rationally and in good faith—not whether it was right." *Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 410 (2nd Cir. 1977). Thus, the [committee's] interpretation of the intent or meaning of the provisions of the [benefit plan] need not be the best possible decision, only one with a rational justification." *Griffis* v. *Delta Family-Care Disability, supra* at 825.

The Eleventh Circuit applied this standard and affirmed the District Court's order for a number of reasons (A. 12-A.

17). First, the court noted that CIBA-GEIGY's interpretation of the termination policy to deny severance pay was a "fair reading" based on the "special situation" language of Section 2.9.2 and the fact that Petitioners kept their jobs at full pay (A. 14). Second, the court found that CIBA-GEIGY's interpretation of the plan was consistent with its application in other divestiture situations and stated that "nothing in the record indicates Kase acted in anything but good faith" (A. 14-A. 15). Third, the court found that the employee handbook provision summarizing Section 2.9.2, as well as a January 1981 memo, put the Petitioners on notice that they might not receive severance benefits (A. 15-A. 16). Finally, the court ruled that Petitioners "have presented no evidence sufficient to establish that Kase's decision to deny severance pay was arbitrary or capricious" (A. 17).

Although Petitioners argued that the arbitrary and capricious standard should not apply due to Respondent's noncompliance with various ERISA procedures, the Court of Appeals found no evidence of any such alleged violations. Moreover, as the court stated, "there is simply no authority for the proposition that procedural errors in an ERISA plan's management requires something other than the arbitrary and capricious standard of review" (A. 7).[4] Indeed, the Fourth Circuit recently expressly rejected the same argument presented by Petitioners here in a closely analogous severance pay case. The Fourth Circuit applied the arbitrary and capricious standard and upheld the denial of severance pay. *Holland* v.

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[4] Even *Blau* v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir.) *cert. denied*, 54 U.S.L.W. 3227 (Oct. 7, 1985), heavily relied upon by Petitioners, applied the arbitrary and capricious standard to review a severance pay determination despite its findings of wholesale ERISA procedural violations. See *infra* at p.11. The court of appeals simply noted that it was *not* passing on whether the arbitrary and capricious standard was the only standard that might be applied. *Id.* at 1352-1353.

Burlington Industries, Inc., ____ F.2d ____, 6 E.B.C. 2129, 2135-2136 (4th Cir. 1985).

The Eleventh Circuit's decision is further supported by other decisions in which federal courts have denied severance pay claims in remarkably similar situations. See *Jung* v. *FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Sly* v. *P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983); *Dhayer* v. *Wierton Steel Division*, 571 F.Supp. 316 (N.D. W.Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984); *Rynar* v. *CIBA-GEIGY Corp.*, No. 82 C 2866, slip op. (N.D. Ill. June 30, 1983); *Pabst Brewing Co.* v. *Anger*, 610 F. Supp. 214 (D. Minn. 1985).

As these cases show, the lower courts are uniformly and correctly applying the arbitrary and capricious standard to the facts and plan language on a case-by-case basis. The Eleventh Circuit's decision is consistent with these other decisions and, contrary to Petitioner's contention (Petition, p. 22), presents this Court with no important questions to review.

At bottom this remains a dispute over the interpretation of CIBA-GEIGY's policy and Petitioners are simply engaged in one final attempt to change a Company decision they do not like. The court below correctly applied the appropriate standard in reviewing that decision on its facts.

B. The Questions Presented By Petitioners Are Not Properly Raised In This Case.

In their phrasing of the questions presented and throughout their petition for a writ of certiorari, Petitioners claim that CIBA-GEIGY disavowed its ERISA obligations and violated ERISA's procedural requirements with respect to the termination policy (Petition pp. i, 9-11, 14, 17, 20, 28). These contentions are at the heart of the Petition but they find no support in the record.

There is no evidence that CIBA-GEIGY disavowed its ERISA obligations or otherwise violated ERISA's procedural requirements.[5] Neither the District Court nor the Eleventh Circuit made any such finding. Indeed, the record evidence shows that CIBA-GEIGY substantially complied with the requirements which Petitioners assert were violated.

Despite Petitioners' claim that CIBA-GEIGY violated 29 U.S.C. § 1022, concerning the content of the summary plan description, undisputed record evidence establishes that the CIBA-GEIGY handbook fairly summarized the severance pay policy. Without repeating plan terms verbatim, the handbook sections specifically put employees on notice that a different severance policy may apply in special circumstances (A. 15). Moreover, the handbook contained a statement of ERISA rights, a claims procedure and other information regarding benefit plan administration in general.

Repondents also substantially complied with 29 U.S.C. § 1102. Although the personnel policy did not specifically name any person to act as a fiduciary to administer the severance policy, the statute contemplates such an omission by providing that the plan sponsor shall be deemed plan administrator if no administrator is named. 29 U.S.C. § 1002(16)(A). CIBA-GEIGY, as plan sponsor, was a fiduciary under the statute. Other Respondents also were and acted as fiduciaries; they were sued as such by Petitioners.

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[5] Petitioners contend that CIBA-GEIGY disavowed its ERISA obligations because it initially took the position that its unfunded severance pay program was not subject to ERISA. In light of the fact that Courts of Appeals have continued to pass on this issue even after this case was argued in the Eleventh Circuit, it was not unreasonable for CIBA-GEIGY to take this position in 1983. See *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320, 325 (2d Cir. 1985); *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1502-03 (9th Cir. 1985); *Holland* v. *Burlington Industries, Inc.*, ____ F.2d ____, 6 E.B.C. 2129, 2131 (4th Cir. 1985). Moreover, as shown *infra* CIBA-GEIGY substantially complied with ERISA's procedural requirements.

In addition, Petitioners erroneously contend that the normal standards should not apply because the decision-maker, Kase, was not a named fiduciary or did not believe that CIBA-GEIGY's termination policy was governed by ERISA. Fiduciary accountability under ERISA is based upon conduct, not belief or nomenclature. See 29 U.S.C. § 1002(21)(A); see also *Eaves* v. *Penn*, 587 F.2d 453, 458-59 (10th Cir. 1978); *Donovan* v. *Williams*, 4 E.B.C. 1237 (N.D. Ohio 1983); *Fulk* v. *Bagley*, 88 F.R.D. 153, 161-162 (M.D.N.C. 1980); *Freund* v. *Marshall and Illsley Bank*, 485 F.Supp. 629, 635 (W.D. Wis. 1979).

Because Kase was acting with discretion and authority concerning management and administration of a plan, he *was* a fiduciary; he was charged with fiduciary duties under ERISA; and his actions should be reviewed under the applicable standard—the arbitrary and capricious standard. See, *e.g.*, *Challenger* v. *Local Union No. 1 of International Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 619 F.2d 645, 649 (7th Cir. 1980); *Fentron Industries* v. *Nat. Shopmen Pension Fund*, 674 F.2d 1300, 1307 (9th Cir. 1982).

Finally, assuming *arguendo* that Respondents failed to comply with certain of ERISA's procedural requirements, this does not mean, as Petitioners argue, that the proper remedy is to suspend the arbitrary and capricious standard. Such a result is particularly inappropriate where Petitioners have not shown harm or prejudice resulting from the alleged procedural violations.[6]

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[6] In the absence of such a showing, courts in analogous circumstances have refused to award statutory penalties provided by ERISA for procedural violations. See, *e.g.*, *Scholmchik* v. *Retirement Plan of the Amalgamated Insurance Fund*, 502 F.Supp. 240, 245 (E.D. Pa. 1980), *aff'd*, 671 F.2d 496 (3rd Cir. 1981); *Adams* v. *Western Conference of Teamsters Pension Plan*, 484 F.Supp. 933, 935 (D. Utah, 1979); *Pollock* v. *Castrovinci*, 476 F.Supp. 606, 618 (S.D. N.Y. 1979), *aff'd*, 622 F.2d 575 (2d Cir. 1980).

In sum, even assuming that procedural infirmities can ever eviscerate or substantially modify the arbitrary and capricious standard of review under ERISA, the Eleventh Circuit properly refused to do so here because Respondents substantially complied with their statutory obligations.

C. The Decision Below Is Consistent With *Blau* v. *Del Monte Corp.*

Petitioners erroneously contend that the Eleventh Circuit's decision is in conflict with the Ninth Circuit's decision in *Blau* v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir.), *cert. denied*, 54 U.S.L.W. 3227 (Oct. 7, 1985) (Petition p. 23-24). In *Blau* the court applied the arbitrary and capricious standard to reverse a summary judgment in favor of a plan administrator which had denied claims for severance pay. As the Eleventh Circuit expressly held, however, *Blau* is distinguishable from this case (A. 17).

First, the *Blau* severance policy contained no provision like Section 2.9.2 of CIBA-GEIGY's plan which expressly excepted "special situations" from coverage.

Second, the *Blau* court found that Del Monte actively concealed the severance plan from its employees. In contrast, the CIBA-GEIGY policy was summarized in an employee handbook which was distributed to Petitioners.

Finally, the *Blau* court found that Del Monte "flouted" ERISA's provisions in a "wholesale and flagrant" manner. *Id.* at 1353. Here the record evidence established that CIBA-GEIGY substantially complied with all ERISA requirements.

Plainly, there is no conflict among the circuit courts of appeals.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THEOPHIL C. KAMMHOLZ
(Counsel of Record)
CHARLES B. WOLF
EDWARD C. JEPSON, JR.
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200
Counsel for Respondents

Of Counsel:
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200

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